ORIGINAL  
JOSEPHINE TONG,IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

§  
§ Plaintiff,  
§  
§ vs. § CIVIL ACTION NO. 4:03-CV-1234-Y  
§  
§ DIRECT TRADING CORP., DIRECT  
§ TRADING, GP, INC., DIRECT  
§ TRADING INSTITUTIONAL, INC.,  
§ DIRECT TRADING MANAGEMENT,  
§ L.P., MARK GULIS AND  
§ ALLAN PETERSON,  
§  
§ Defendants. §

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S EXPERT WITNESS  
AND BRIEF IN SUPPORT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Direct Trading, Corp., Direct Trading GP, Inc., Direct Trading Institutional, Inc., Direct Trading Management, L.P., and Mark Gulis (collectively "Defendants") file this Motion to Strike Plaintiff's Expert Witness and Brief in Support, and would show the Court as follows:

I.

BACKGROUND

1. Plaintiff Josephine Tong ("Plaintiff" or "Tong") was employed as an independent contractor for Direct Trading Corporation ("DTC") from approximately March 2000 until

her resignation on July 12, 2001. Plaintiff alleges that Defendants schemed to deprive her of bonus compensation, wrongfully withheld her sales bonus income and commissions, misrepresented that she needed a Series 63 license, refused to reimburse her for business expenses, discriminated against her on the basis of race and gender, and retaliated against her for complaining of discrimination. Defendants deny each of these allegations.

2. On August 24, 2004, Defendants noticed the depositions of Plaintiff and Plaintiff's only expert witness, Frank Birgfeld ("Birgfeld"). The depositions were to be held at the law offices of Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P. on October 6 and 7, 2004, respectively. *See Notice of Deposition of Josephine Tong, attached as Exhibit A; Notice of Deposition of Frank J. Birgfeld, attached as Exhibit B.* Although Plaintiff did not file a motion to quash or a motion for a protective order, neither Tong nor Birgfeld appeared for deposition. In fact, Plaintiff's counsel did not even notify Defendants' counsel that the witnesses would not appear until approximately 5:00 pm on October 5, 2004, and then only because Defendants' counsel inquired. Plaintiff's counsel, Jeffrey T. Mitchell, gave no reason for not producing the witnesses, other than to say that he was "between trials." Because Tong and Birgfeld were not produced for deposition, on October 8, 2004, Defendants filed a Motion to Compel.

3. On November 16, 2004, the Court ordered that Tong and Birgfeld be produced for deposition at the United States District Courthouse in Fort Worth on November 30, 2004 and December 1, 2004, respectively. Plaintiff and her expert again failed to appear for deposition on those dates.

4. At the November 30, 2004 hearing on Defendant's Motion to Compel, Plaintiff offered no legitimate excuse for Tong and Birgfeld's failure to appear at their Court-ordered depositions. Plaintiff's counsel argued that the witnesses were not produced because Plaintiff filed a Motion to Compel Arbitration, and Plaintiff did not want to waive her right to arbitration by participating in depositions. However, Plaintiff never filed a motion for a protective order to prevent Tong and Birgfeld from being deposed. Instead, Plaintiff simply ignored the Court's order, and Tong and Birgfeld failed to appear at their Court-ordered depositions.

II.

ARGUMENT AND AUTHORITIES

5. Because Plaintiff and Birgfeld twice failed to appear for their depositions without good cause being shown, the Court should exclude the expert opinions of Birgfeld from being introduced into evidence. *See Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 379-82 (5th Cir. 1996).

6. Under the Federal Rules of Civil Procedure, if a party fails to appear at a properly-noticed deposition, the Court may make such orders in regard to the failure as are just, including an order refusing to allow the disobedient party to support designated claims, an order prohibiting the party from introducing designated matters into evidence, or an order striking out pleadings or parts thereof. FED. R. CIV. P. 37(d) (not an exhaustive list of available remedies).

7. Plaintiff and her expert's first depositions were properly noticed. *See Exhibits A and*

B. Although Plaintiff did not file a motion to quash or a motion for a protective order, neither Tong nor Birgfeld appeared for this deposition. Plaintiff and her expert's second depositions were Court ordered. In direct contravention to this Court order, both Tong and Birgfeld again failed to appear for their depositions. Because of the witnesses repeated failure to appear for deposition, the Court should refuse to allow Plaintiff to introduce Birgfeld's expert opinions into evidence. See *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 379-82 (5th Cir. 1996) (upholding District Court's decision to strike expert testimony when experts came ill-prepared for court-ordered depositions).

8. Additionally, failure to appear at a deposition may not be excused on the ground that the deposition is objectionable, unless the party failing to act has a pending motion for a protective order. FED. R. CIV. P. 37(d). Tong and Birgfeld cannot now use Plaintiff's desire to arbitrate this lawsuit as an excuse for failing to attend their Court-ordered depositions. Plaintiff has never moved for a protective order to prevent Tong or Birgfeld from being deposed. Instead, the witnesses merely failed to appear, and Plaintiff subsequently claimed that her desire to arbitrate excused their appearances. This, however, is not the law. Tong and Birgfeld's deliberate failure to appear at their depositions is a clear violation of this Court's order. The Court is vested with broad discretion to preserve the integrity and purpose of the discovery process. See *Geiserman v. MacDonald*, 893 F.2d 787, 790 (5th Cir. 1990). The Court should use this discretion to prevent Plaintiff from introducing matters related to the expert opinions of Birgfeld into evidence.

9. Further, Defendants will be materially prejudiced if Plaintiff is permitted to perpetually delay the depositions of these witnesses. Each delay in producing and deposing Plaintiff and her expert has resulted in additional expenses for Defendants, and has disrupted Defendants' preparation of the case. To properly defend themselves in this lawsuit, it is imperative that Defendants be afforded the opportunity to depose witnesses. Plaintiff should be sanctioned for deliberately hindering the deposition process.

III.

MOTION TO STRIKE PLAINTIFF'S EXPERT

10. Defendants request that pursuant to Federal Rule of Civil Procedure 37(b), the Court enter an order prohibiting Plaintiff from introducing matters related to the expert opinions of Frank J. Birgfeld into evidence.

11. Defendants further request that pursuant to Federal Rules of Civil Procedure 37(b)(2)(E) and 37(d), the Court award to these Defendants reasonable expenses and attorney's fees incurred in preparing and presenting this Motion, in the amount of \$750.00, or in amounts to be shown, and that such amounts as may be established be paid within 7 days of the Court's order.

IV.

REQUEST FOR RELIEF

12. Defendants respectfully request that the Court grant Defendants' Motion to Strike Plaintiff's Expert as requested herein, and for such further relief to which Defendants may be entitled.

Respectfully submitted,

MATTHEWS, STEIN, SHIELS, PEARCE,  
KNOTT, EDEN & DAVIS, L.L.P.

By: 

KENNETH R. STEIN  
STATE BAR NO. 19128300

CHRISTEN C. PAQUIN  
STATE BAR NO. 24040640

8131 LBJ Freeway, Suite 700  
Dallas, Texas 75251  
(972) 234-3400 Telephone  
(972) 234-1750 Telecopier

ATTORNEYS FOR DIRECT TRADING  
CORP., DIRECT TRADING, GP INC.,  
DIRECT TRADING INSTITUTIONAL,  
INC., DIRECT TRADING  
MANAGEMENT, L.P., and MARK  
GULIS

CERTIFICATE OF CONFERENCE

Pursuant to Rule 7.1 of the Local Rules of the United States District Court of the Northern District of Texas, Defendants' counsel attempted in good faith to confer with Plaintiff's counsel regarding the substance of this Motion. On December 7, 2004, Defendants' counsel Christen Paquin attempted to contact Plaintiff's counsel Jeffrey Mitchell by telephone. Ms. Paquin left Mr. Mitchell a voice mail, but he did not return her telephone call.



---

CHRISTEN C. PAQUIN

CERTIFICATE OF SERVICE

This is to certify that a true copy of Defendants' Motion to Compel was forwarded to the following counsel of record by facsimile on December 8, 2004:

Mr. John S. Burke  
Higgins & Burke, P.C.  
7 S. Second Avenue  
St. Charles, IL 60174

Mr. Jeffrey Mitchell  
Konicek & Dillon, P.C.  
21 W. State Street  
Geneva, IL 60134

Mr. Andrew G. Platt  
910 Mallick Tower  
One Summit Ave.  
Fort Worth, TX 76102-2618



---

CHRISTEN C. PAQUIN



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

JOSEPHINE TONG, §  
§  
Plaintiff, §  
§  
vs. § CIVIL ACTION NO. 4:03-CV-1234-Y  
§  
§  
DIRECT TRADING CORP., DIRECT §  
TRADING, GP, INC., DIRECT §  
TRADING INSTITUTIONAL, INC., §  
DIRECT TRADING MANAGEMENT, §  
L.P., MARK GULIS AND §  
ALLAN PETERSON, §  
§  
Defendants. §

NOTICE OF DEPOSITION

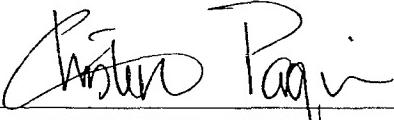
TO: Josephine Tong ("Tong"), by and through her counsel of record, Mr. John S. Burke, Higgins & Burke, P.C., 7 S. Second Avenue, St. Charles, IL 60174.

Please take notice that, pursuant to the Federal Rules of Civil Procedure, the oral deposition of Josephine Tong will be taken by Kenneth R. Stein, Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P. attorneys for Direct Trading Corp., Direct Trading, GP, Inc., Direct Trading Institutional, Inc., Direct Trading Management, L.P., and Mark Gulis, Defendants in the above styled and numbered cause, at the offices of Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P., 8131 LBJ Freeway, Suite 700, Dallas, Texas 75251, at 9:00a.m. on October 6, 2004. Such deposition, when taken, will be used as evidence in the above styled and numbered cause. The witness shall attend from day to day until the deposition is completed.

Respectfully submitted,

MATTHEWS, STEIN, SHIELS, PEARCE,  
KNOTT, EDEN & DAVIS, L.L.P.

By:



KENNETH R. STEIN

STATE BAR NO. 19128300

CHRISTEN C. PAQUIN  
STATE BAR NO. 24040640

8131 LBJ Freeway, Suite 700  
Dallas, Texas 75251  
(972) 234-3400 Telephone  
(972) 234-1750 Telecopier

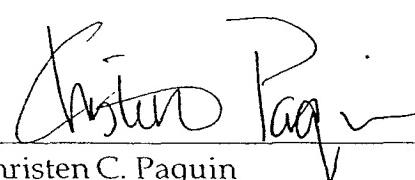
ATTORNEYS FOR DIRECT TRADING  
CORP., DIRECT TRADING, GP, INC.,  
DIRECT TRADING INSTITUTIONAL,  
INC., DIRECT TRADING  
MANAGEMENT, L.P., and MARK  
GULIS

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document has been forwarded to the following counsel of record by facsimile on this the 24<sup>th</sup> day of August, 2004:

Mr. John S. Burke  
Higgins & Burke, P.C.  
7 S. Second Avenue  
St. Charles, Illinois 60174

Mr. Daniel F. Konicek  
Mr. Thomas A. Dillon  
Konicek & Dillon, P.C.  
21 W. State Street  
Geneva, Illinois 60134



Christen C. Paquin



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

JOSEPHINE TONG, §  
§  
Plaintiff, §  
§  
vs. § CIVIL ACTION NO. 4:03-CV-1234-Y  
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§  
DIRECT TRADING CORP., DIRECT §  
TRADING, GP, INC., DIRECT §  
TRADING INSTITUTIONAL, INC., §  
DIRECT TRADING MANAGEMENT, §  
L.P., MARK GULIS AND §  
ALLAN PETERSON, §  
§  
Defendants. §

NOTICE OF DEPOSITION

TO: Josephine Tong, c/o Mr. John S. Burke, Higgins & Burke, P.C., 7 S. Second Avenue, St. Charles, IL 60174.

Please take notice that, pursuant to the Federal Rules of Civil Procedure, the oral deposition of Frank J. Birgfeld will be taken by Kenneth R. Stein, Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P. attorneys for Direct Trading Corp., Direct Trading, GP, Inc., Direct Trading Institutional, Inc., Direct Trading Management, L.P., and Mark Gulis, Defendants in the above styled and numbered cause, at the offices of Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P., 8131 LBJ Freeway, Suite 700, Dallas, Texas 75251, at 9:00a.m. on October 7, 2004. Such deposition, when taken, will be used as evidence in the above styled and numbered cause. The witness shall attend from day to day until the deposition is completed.

The deponent is hereby directed, pursuant to the Federal Rules of Civil Procedure, to bring with him and produce at his deposition, for inspection, copying and use at the deposition, any and all documents or other tangible items as described below. As used herein, the term "document" means, without limitation, any tangible or reproducible material, whether typed, handwritten, printed, recorded or otherwise, or any photographs, photostat, microfilm, or reproduction thereof, including, but not limited to, originals (or copies where originals are unavailable) of all papers, records, studies, analyses, notes, comments, calendars, diaries, telexes, telegrams, facsimiles, photographs, models, diagrams, plans, specifications, charts, blueprints, drawings, minutes of meetings, correspondence, memoranda, reports, ledgers, journals, contracts, agreements, bank statements, statements of account, canceled checks, inventories, partnership agreements, articles of incorporation, corporate minutes, resolutions, stock certificates, stock certificate transfer records, bylaws, and any other corporate record, sales records or receipts, tape recordings, video records, films, or other audio or visual recordings, and any other items similar to any of the foregoing, however denominated. The documents and other items requested are:

1. Any and all correspondence regarding the work or services of the witness in connection with the above styled and numbered cause or the transactions, events or occurrences subject of the above styled and numbered cause.
2. Any and all documents and physical materials provided to or reviewed by the witness in connection with his or her work or services in connection with the above

styled and numbered cause or relating to the transactions, events or occurrences subject of the above styled and numbered cause.

3. Any and all documents and tangible things including, without limitation, all tangible reports, notes, charts, summaries, diagrams, physical models, compilations of data and other material which the witness prepared, made, created, participated in, or supervised in anticipation of the witness' trial or deposition testimony or in connection with his or her work, services, opinions, conclusions or findings in connection with the above styled and numbered cause or the transactions, events or occurrences subject of the above styled and numbered cause.
4. Any and all photographs, video-tapes, other audio or video recordings, models, diagrams, charts, graphs, depictions or reproductions of any aspect of the transactions, events or occurrences subject of the above styled and numbered cause.
5. A copy of the resume or curriculum vitae of the witness.
6. Copies of all timesheets, bills, invoices, and related documents generated by or at the direction of the witness in connection with his or her work or services in connection with the above styled and numbered cause or relating to the transactions, events or occurrences subject of the above styled and numbered cause.

Respectfully submitted,

MATTHEWS, STEIN, SHIELS, PEARCE,  
KNOTT, EDEN & DAVIS, L.L.P.

By: 

KENNETH R. STEIN  
STATE BAR NO. 19128300

CHRISTEN C. PAQUIN  
STATE BAR NO. 24040640

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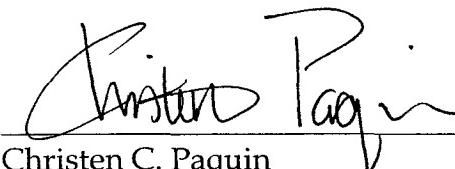
ATTORNEYS FOR DIRECT TRADING  
CORP., DIRECT TRADING, GP, INC.,  
DIRECT TRADING INSTITUTIONAL,  
INC., DIRECT TRADING  
MANAGEMENT, L.P., and MARK  
GULIS

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document has been forwarded to the following counsel of record by facsimile on this the 24<sup>th</sup> day of August, 2004:

Mr. John S. Burke  
Higgins & Burke, P.C.  
7 S. Second Avenue  
St. Charles, Illinois 60174

Mr. Daniel F. Konicek  
Mr. Thomas A. Dillon  
Konicek & Dillon, P.C.  
21 W. State Street  
Geneva, Illinois 60134

  
Christen C. Paquin

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

JOSEPHINE TONG, §  
§  
Plaintiff, §  
§  
vs. § CIVIL ACTION NO. 4:03-CV-1234-Y  
§  
DIRECT TRADING CORP., DIRECT §  
TRADING, GP, INC., DIRECT §  
TRADING INSTITUTIONAL, INC., §  
DIRECT TRADING MANAGEMENT, §  
L.P., MARK GULIS AND §  
ALLAN PETERSON, §  
§  
Defendants. §

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE  
PLAINTIFF'S EXPERT WITNESS

On this day, the Court considered Defendants Direct Trading, Corp., Direct Trading GP, Inc., Direct Trading Institutional, Inc., Direct Trading Management, L.P., and Mark Gulis' (collectively, "Defendants") Motion to Strike Plaintiff's Expert Witness, and, having considered the merits of the Motion, the Court is of the opinion that it should be granted. It is, therefore,

ORDERED that Plaintiff is prohibited from introducing the expert opinions of Frank J. Birgfeld into evidence. Plaintiff and Plaintiff's attorneys are also ordered to pay Defendants' expenses and attorney's fees incurred in presenting this Motion in the amount of \$ \_\_\_\_\_, to be paid within 7 days from the date of this Order.

Signed this the \_\_\_\_\_ day of \_\_\_\_\_, 2004.

---

CHARLES BLEIL  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

JOSEPHINE TONG, §  
§  
Plaintiff, §  
§  
vs. § CIVIL ACTION NO. 4:03-CV-1234-Y  
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DIRECT TRADING CORP., DIRECT §  
TRADING, GP, INC., DIRECT §  
TRADING INSTITUTIONAL, INC., §  
DIRECT TRADING MANAGEMENT, §  
L.P., MARK GULIS AND §  
ALLAN PETERSON, §  
§  
Defendants. §

AFFIDAVIT OF KENNETH STEIN

Kenneth Stein hereby states as follows:

1. My name is Kenneth Stein. I am over 21 years of age; have never been convicted of a felony or crime involving theft, dishonesty, breach of a duty of trust or moral turpitude; am competent and authorized to make this affidavit; and have personal knowledge and hereby state that the facts contained herein are true and correct.
2. I am a partner with the law firm of Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis, L.L.P. ("MSS"), and have been since its inception.
3. I am one of the attorneys of record for Direct Trading Corp., Direct Trading, GP, Inc., Direct Trading Institutional, Inc., Direct Trading Management, L.P., and Mark Gulis, ("Defendants" collectively). I have been an attorney of record on this case

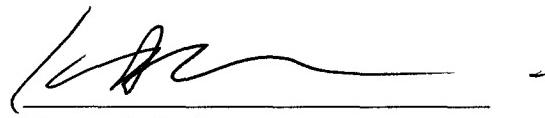
since August 5, 2004.

4. I have been primarily responsible for handling this case since its inception. Associates with my firm, and legal assistants with my firm under my direction have also performed legal work on this matter.
5. MSS, as a part of its usual course of business, keeps regular records of the legal work performed by its attorneys and legal assistants. In connection with my being a partner of MSS, I have become familiar with these records. I have personal supervision, custody, control and access to the permanent records of MSS as the records pertain to the legal services rendered herein. I have examined these records, and the entries on said records were regularly made at or near the time of the transaction, act or event recorded.
6. MSS partners, associates, or legal assistants have performed the following legal services for Defendants related to the depositions on Josephine Tong and Frank Birgfeld:
  - (a) Prepared for the deposition of Josephine Tong scheduled for October 6, 2004;
  - (b) Prepared for the deposition of Frank Birgfeld scheduled for October 7, 2004;
  - (c) Conducted legal research and drafted Defendants' Motion to Compel;
  - (d) Prepared correspondence to Defendants regarding the depositions;
  - (e) Communicated by telephone with Defendants regarding the

- depositions;
- (f) Prepared for and attended the Court-ordered deposition of Josephine Tong scheduled for November 30, 2004;
  - (g) Prepared for and attended the hearing on Defendants' Motion to Compel; and
  - (h) Prepared evidence to support request for sanctions.
7. Additional time has been required to compile information and prepare affidavits related to these attorney's fees. Anticipated reasonable attorney's fees for this service equals approximately \$600.
8. All the services performed have been necessary, and all time spent performing the services has been reasonable. There has been no duplication of efforts by multiple attorneys. All work performed by a legal assistant was done under my supervision.
9. I am familiar with the customary fees charged for services in business litigation matters in the Dallas-Fort Worth area. I am also familiar with awards of attorney's fees in similar matters. The fees charged for these services are based upon the experience, reputation and ability of the attorneys and legal assistants performing the services.
10. Based on all the foregoing factors, it is my opinion that the reasonable attorney's fees Defendants incurred related to preparing for and seeking the depositions of Josephine Tong and Frank Birgfeld and Defendants' Motion to Compel is \$4,777.50. Of this total, I estimate that \$1,000.00 worth of services will be utilized when the

depositions are actually taken. Thus, the loss to the Defendants based on the non-appearance (twice) of the witnesses is \$3,777.50.

I declare under penalty of perjury that the foregoing is true and correct.

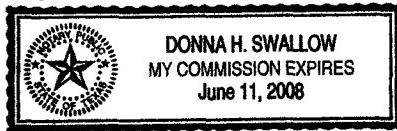


Kenneth Stein

SUBSCRIBED and SWORN TO BEFORE ME on this 7th day of December, 2004,  
to certify which witness my hand and official seal.

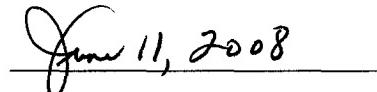


Notary Public, State of Texas



Print or Type Notary's Name

My Commission Expires:



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

JOSEPHINE TONG,

Plaintiff,

vs.

DIRECT TRADING CORP., DIRECT  
TRADING, GP, INC., DIRECT  
TRADING INSTITUTIONAL, INC.,  
DIRECT TRADING MANAGEMENT,  
L.P., MARK GULIS AND  
ALLAN PETERSON,

Defendants.

CIVIL ACTION NO. 4:03-CV-1234-Y

AFFIDAVIT OF MARK GULIS

Mark Gulis hereby states as follows:

1. My name is Mark Gulis. I am over 21 years of age; have never been convicted of a felony or crime involving theft, dishonesty, breach of a duty of trust or moral turpitude; am competent and authorized to make this affidavit; and have personal knowledge and hereby state that the facts contained herein are true and correct.
2. I am Corporate Secretary for Direct Trading Corp. ("DTC"). I have held this position since 1994. I am also the co-founder and part owner of Direct Trading GP, Inc. ("DTG"), Direct Trading Management, L.P. ("DTM"), and Direct Trading Institutional, Inc. ("DTI"), and have been since approximately June 2001.

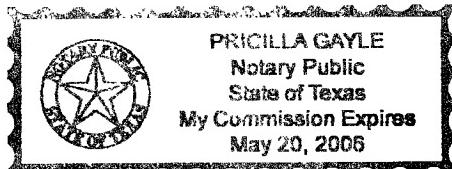
3. Because of my affiliation with DTC, DTG, DTM and DTI, and because I have personally been named a defendant in this lawsuit, it is necessary, and appropriate for me to be present at the deposition of Josephine Tong ("Tong").
4. By Court order of November 30, 2004, Tong's deposition has been reset for December 11, 2004 at 9:00 a.m. I was present on November 30, 2004 for the deposition of Tong, which was Court-ordered for that date, but Tong did not appear.
5. I have previously scheduled a vacation, and was supposed to be away from Dallas on December 11, 2004. To attend Tong's deposition on that day, I will have to fly from Orlando, Florida to Dallas, Texas. The price of this airfare was \$350.70.

I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Mark Gulis

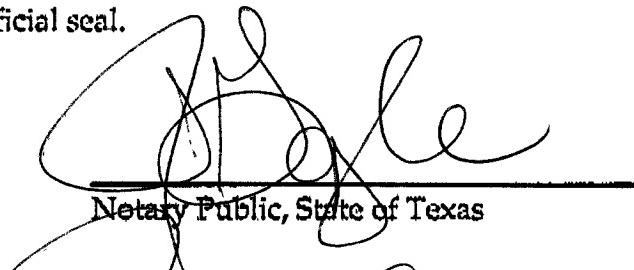
SUBSCRIBED and SWORN TO BEFORE ME on this 11 day of December, 2004,

to certify which witness my hand and official seal.



My Commission Expires:

5/06

  
\_\_\_\_\_  
Priscilla Gayle  
Print or Type Notary's Name

Page 5

1           IN THE UNITED STATES DISTRICT COURT  
2           FOR THE NORTHERN DISTRICT OF TEXAS  
3           FORT WORTH DIVISION

4           JOSEPHINE TONG, :  
5           PLAINTIFF,     :  
6           VS.            :  
7           DIRECT TRADING CORP., ET AL., :  
8           DEFENDANTS.    :

9           REPORTER'S CERTIFICATION TO  
10          THE CERTIFICATE OF NONAPPEARANCE  
11          TAKEN ON NOVEMBER 30, 2004

12  
13  
14           I, Sarah Mae Blackburn, a Certified  
15        Shorthand Reporter in and for the State of Texas,  
16        hereby certify pursuant to the Rules the following:

17           That the statements contained in the  
18        Certificate of Nonappearance for the deposition of  
19        JOSEPHINE TONG are true and correct;

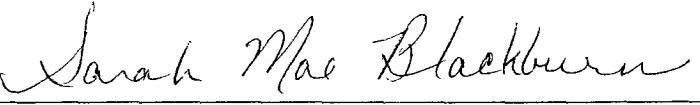
20           That \$ 100.00 is the taxable cost for  
21        the preparation of the completed Certificate of  
22        Nonappearance and any copies of attachments, charged  
23        to Mr. Kenneth R. Stein, attorney for Defendants;

Page 6

1                   That the original of the Certificate of  
2 Nonappearance transcript, together with copies of any  
3 and all statements, was delivered to Mr. Kenneth R.  
4 Stein, Matthews, Stein, Shiels, Pearce, Knott, Eden &  
5 Davis, L.L.P., 8131 LBJ Freeway, Suite 700, Dallas,  
6 Texas 75251.

7  
8                   Subscribed and sworn to on this the

9                   8 day of December, 2004.

10  
11  
12  
13                     
14                   SARAH MAE BLACKBURN, Texas CSR #1332  
15                   Expiration Date: 12-31-05  
16                   Firm Registration No. 95  
17                   INDEPENDENT REPORTING  
18                   6500 Greenville Avenue, Suite 445  
19                   Dallas, Texas 75206  
20                   (214) 373-4977  
21                   (214) 363-7758 FAX  
22  
23  
24  
25

A  
EXHIBITS

**KONICEK & DILLON, P.C.**

**ATTORNEYS**

21 W. STATE STREET  
GENEVA, IL 60134

JEFFREY T. MITCHELL  
JEFF@KONICEKDILLONLAW.COM

(630) 262-9659  
FAX (630) 262-9659  
KONICEKDILLON.LAWOFFICE.COM

November 29, 2004

**VIA FACSIMILE**  
(972) 234-1750

Kenneth R. Stein  
Matthews, Stein, Shiels, Pearce, Knott, Eden & Davis  
Crosspoint Atrium  
8131 LBJ Freeway, Suite 700  
Dallas, Texas 75251

RE: Tong v. Direct Trading

Dear Mr. Stein:

We have attempted to contact our client since receipt on November 22, 2004 of the court's order compelling her deposition for November 30, 2004. We have not been able to do so. Accordingly, we are unable to produce her for deposition tomorrow. I will be present at the courthouse tomorrow morning at 9:00 a.m. and will also attend the hearing with the Magistrate at 3:00 p.m. However, kindly cancel any court reporter that may have been ordered as the deposition cannot proceed without the deponent. This letter is sent in an attempt to prevent your firm from incurring fees and costs of Ms. Tong's deposition.

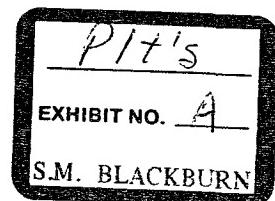
In addition, we intend to discuss the issues raised in our motion to vacate with the Magistrate during this 3:00 p.m. hearing with respect to the pending motion to compel arbitration and stay proceedings.

If you wish to discuss this matter prior to tomorrow, I will be available at 4:00 p.m. CST.

Very truly yours,

KONICEK & DILLON, P.C.

Jeffrey T. Mitchell  
JTM/jll  
cc: John Burke



/29/2004 MON 14:34 FAX 630 262 9659

KONICEK &amp; DILLON, P.C.

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\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

TX/RX NO	3991
CONNECTION TEL	19722341750
CONNECTION ID	
ST. TIME	11/29 14:34
USAGE T	00'39
PGS. SENT	2
RESULT	OK

KONICEK &amp; DILLON, P.C.

## FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Kenneth Stein	Jeffrey T. Mitchell jeff@konicekdillonlaw.com
COMPANY:	DATE:
Matthews, Stein, et al	November 29, 2004
FAX NUMBER:	TOTAL NO. OF PAGES INCLUDING COVER:
972-234-1750	2
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE:	YOUR REFERENCE NUMBER:
Tong v. Direct Trading	

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY     PLEASE RECYCLE

NOTES/COMMENTS:

Page 1

1           IN THE UNITED STATES DISTRICT COURT  
2           FOR THE NORTHERN DISTRICT OF TEXAS  
3           FORT WORTH DIVISION

4           JOSEPHINE TONG,                                 )  
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MOTION TO COMPEL

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On Tuesday, the 30th day of November, 2004, at 9:30 a.m., the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Charles Bleil, U.S. Magistrate Judge presiding, held in Eldon B. Mahon United States District Courthouse, Fifth Floor, Fort Worth, Tarrant County, Texas.

Proceedings reported by stenography.

Page 2

1 A P P E A R A N C E S

2 APPEARING FOR THE PLAINTIFF:

3 Mr. Jeffrey T. Mitchell  
4 Konicek & Dillon, P.C.  
5 21 West State Street  
Geneva, Illinois 60134  
(630) 262-9659

6 APPEARING FOR THE DEFENDANTS:

7 Mr. Kenneth R. Stein  
8 Matthews, Stein, Shiels, Pearce, Knott, Eden &  
Davis, L.L.P.  
9 8131 LBJ Freeway, Suite 700  
Dallas, Texas 75251  
10 (972) 234-3400

11

12

13

14 HEARING EXHIBIT INDEX

15 NO.	DESCRIPTION	OFFERED	ADMITTED
16 1	11-29-04 Facsimile Transmittal Sheet with attached 11-29-04 Letter to K. Stein from J. Mitchell	6	6
18 2	7-28-04 Letter to J. Burke and J. Mitchell from C. Paquin	20	20

## P R O C E E D I N G S

THE COURT: This hearing was scheduled for 3:00, but Mr. Stein asked if we could have it earlier and, as it turned out, we can. In any event, what this is is a hearing that was scheduled for 3:00 this afternoon on a Motion to Compel and for sanctions. And there was a deposition scheduled for 9:00 today and then one for tomorrow.

The first thing I would like is for the attorneys to stand and enter their appearance of record.

MR. MITCHELL: Jeffrey Mitchell for the Plaintiff, Your Honor.

THE COURT: Mr. Mitchell, good to have you.

MR. MITCHELL: Thank you.

MR. STEIN: My name is Ken Stein. I represent the Defendants that are of record that filed an appearance.

THE COURT: That's all of the Defendants?

MR. STEIN: No, Your Honor, there is actually one Defendant who has not made an appearance, Allan Peterson. I represent all of the other Defendants.

Page 4

THE COURT: Thank you, Mr. Stein. I would like to be officially brought up to date. It is my understanding that the Witness Plaintiff did not appear today.

MR. STEIN: Your Honor, that's correct.

We appeared at 9 o'clock with the Court Reporter to take the deposition of Josephine Tong, who the Court ordered to appear here today at that time in Room 505 on the fifth floor of this same courthouse by order signed November 16th, 2004. Ms. Tong did not appear.

My office received a letter from the Plaintiff's counsel yesterday afternoon sometime indicating that she would not appear. I believe the letter said they were not able to get in touch with her.

I was in Houston for arbitration-ordered depositions yesterday with out-of-state counsel and witnesses and I didn't get back to my office until 10:00 last night. I saw everything that was in my office at 10:00 and made the decision to come here this morning at 9 o'clock and have the Court Reporter appear and make a record of whatever did happen or did not happen.

I've also inquired of counsel as to the deposition tomorrow, the expert witness designated by

1 the Plaintiff, Frank Birgfeld. And counsel has  
2 informed me that Mr. Birgfeld is not going to appear  
3 for deposition either.

4 That's where we are. I'm sorry?

5 THE COURT: I was going to ask  
6 Mr. Stein. Did you have a copy of that letter?

7 MR. STEIN: The letter to me?

8 THE COURT: Yes, sir.

9 MR. STEIN: I believe so.

10 MR. MITCHELL: Your Honor, I had that  
11 marked at the start of the deposition, I guess the  
12 certificate, so that is part of the record, Your  
13 Honor.

14 MR. STEIN: Yes, Your Honor, I have a  
15 copy I can show you.

16 THE COURT: As part of the record for  
17 this hearing?

18 MR. MITCHELL: Well, we started the  
19 deposition at 9 o'clock.

20 THE COURT: Oh, okay. Well, this is a  
21 different matter. I would like to have a copy of  
22 that.

23 MR. STEIN: I have it, Your Honor.

24 THE COURT: As an exhibit for this  
25 hearing. Thank you.

1                   MR. STEIN: The only thing that is on it  
2 that wasn't originally, there are the letters "FYI" in  
3 blue ink that apparently somebody in my office put on,  
4 otherwise, it is as it was received.

5                   THE COURT: Thank you, Mr. Stein.

6                   Mark that as Hearing Exhibit 1.

7                   (Hearing Exhibit Number 1 marked for  
8 identification and admitted.)

9                   THE COURT: Very well. I've read the  
10 letter, Mr. Mitchell, and it says that you intend to  
11 discuss the issues with the Magistrate. I take it  
12 that's me.

13                  MR. MITCHELL: Yes, Your Honor.

14                  THE COURT: Do you want to do that at  
15 this time? It appears to me that the original Motion  
16 to Compel, I did grant, because I thought it was good  
17 and the Motion for Sanctions seemed to have merit and  
18 I was going to address that.

19                  And we might also address further  
20 sanctions, I guess, treat the Motion to Compel as  
21 related to the matter of the failure to appear today  
22 of your client, Josephine Tong, and her expert  
23 witness, if he is not appearing.

24                  MR. MITCHELL: At this time that's  
25 correct, Your Honor.

1                   THE COURT: Very well. I'm here for  
2 anything you want to say and then I will also hear  
3 from Defendants' counsel.

4                   MR. STEIN: Thank you, Your Honor.

5                   THE COURT: At the conclusion of this  
6 hearing I may not rule, because I will require  
7 affidavits regarding the matters of costs and  
8 attorneys' fees, insofar as that would be an  
9 appropriate sanction, among others.

10                  But in any event, Mr. Mitchell?

11                  MR. MITCHELL: Very good, Your Honor.

12 Let me address -- I guess I'll go back to the  
13 beginning and address the original Motion to Compel  
14 that was filed. The depositions for Josephine Tong  
15 and the Plaintiff's expert witness were noticed for  
16 October 6th and 7th of 2004. I am the lead counsel,  
17 I'm the trial counsel in this case and I will also be  
18 the counsel that will be presenting both the  
19 plaintiffs and any other witnesses for their  
20 depositions, both preparing them and presenting them.

21                  I spoke with Mr. Stein on October 5th  
22 and informed him that I was currently engaged in a  
23 trial in the Circuit Court of Cook County and that I  
24 was unable to come to Texas to present Ms. Tong and  
25 Mr. Birgfeld for their depositions.

Page 8

THE COURT: And what time was that speaking?

MR. MITCHELL: It was late in the afternoon of October 5th when it became apparent that our trial was not going to be concluded, and it did not conclude, it did continue throughout that week.

Mr. Stein, rather than ask for additional or alternative dates for these depositions simply stated he expected the depositions to go as scheduled and that he would file a Motion to Compel and seek an order compelling, if the depositions did not go.

After the Defendants filed their Motion to Compel, the Plaintiff, based on the discovery that we received, the written discovery, filed a Motion to Compel arbitration as stated in the proceedings, which we believed addressed the pending Motion to Compel, because that would stay discovery as well as other proceedings in the matter.

While that motion was being briefed in the interim, Your Honor granted the Motion to Compel and directed Ms. Tong to appear today and Mr. Birgfeld to appear tomorrow for their depositions.

One of the positions that I am in, Your Honor, is that there is case law in the Fifth Circuit

1 that says that if I present my client for deposition,  
2 if I engage in discovery that would not be permitted  
3 or allowed in the arbitration forum, I've waived  
4 arbitration.

5 So the first ground is that I have a  
6 duty to my client to preserve her right to arbitration  
7 while this matter is pending. The Defendants have  
8 filed their response to the Motion to Compel  
9 arbitration. We anticipate having our reply on file a  
10 week early and have it on file this week to have it in  
11 front of the District Judge.

12 The Defendants will not be prejudiced in  
13 a legal sense by forestalling depositions if  
14 arbitration is not -- if this matter is not sent to  
15 arbitration. On the other hand, the Plaintiff would  
16 be severely legally prejudiced by essentially being  
17 required to forego her arbitration right if she is  
18 required to sit for her deposition.

19 Secondly, we received this Court's order  
20 compelling these depositions proceed last Tuesday,  
21 which was a week after the order was actually  
22 entered. We attempted to contact our client. I at  
23 least wanted to have her here this afternoon, Your  
24 Honor, as was directed by this Court. We were not  
25 able to actually speak with her until after the close

Page 10

1 of business yesterday. She had just arrived at  
2 LaGuardia Airport after being out of the country in  
3 Spain.

4 THE COURT: Let's go back. I would like  
5 to know when you received the Court's order.

6 MR. MITCHELL: I believe it was last  
7 Tuesday, Your Honor. I'm not sure if that was the  
8 20 --

9 THE COURT: Is that the day it was  
10 entered?

11 MR. MITCHELL: No. It was actually  
12 entered a week prior. We received it one week after  
13 the date it was entered. It was entered directing the  
14 Plaintiff to appear within two weeks. We received it  
15 a week after that. We filed our motion asking the  
16 Court to reconsider or vacate the follow day.

17 THE COURT: I will state that I directed  
18 my Judicial Assistant to ascertain whether you had a  
19 fax number. And she replied that, yes, you did. And  
20 then she said she had sent it and had a confirmation  
21 of that fax.

22 Ms. DuPree, I'm going to ask you to  
23 check with Ms. Fitzhugh and see if she has that, then  
24 I would like that also to be an exhibit to this  
25 hearing.

1                   MR. MITCHELL: And, Your Honor, I state  
2 that I did not receive that on my desk. I will not  
3 say that it was not received by the office, but I did  
4 not see the Court's order until it was received by  
5 mail last Tuesday.

6                   THE COURT: Well, we knew that the  
7 timing was tight and that you needed that notice as  
8 soon as possible and that's why I directed that. We  
9 do have electronic service, but you have to be signed  
10 up for that.

11                  MR. MITCHELL: Well, and I received a  
12 notice from the clerk's office and we are in the  
13 process of signing up to receive that.

14                  THE COURT: But because you weren't and  
15 I knew that, I did direct the faxing of that order.  
16 But go ahead.

17                  MR. MITCHELL: So I guess with respect  
18 to sanctions or corporate sanctions, in addressing the  
19 original Motion to Compel and failure of the Plaintiff  
20 and her expert witness to appear in October of this  
21 year for their depositions, Defendants' counsel was  
22 spoken to the day before those depositions to inform  
23 him that neither one could go, because Plaintiff's  
24 counsel was previously engaged.

25                  If counsel prepared for those

Page 12

1 depositions and had time preparing for those  
2 depositions, that time will not be wasted at some  
3 point in time if those depositions go forward.

4 THE COURT: That depends on the lawyer.  
5 I once had a law partner who could prepare a case for  
6 trial and if it got continued for six months or ten  
7 months, he didn't need to go over any of his  
8 preparation and he was ready. He was the only lawyer  
9 I ever knew that could do that. I certainly  
10 couldn't.

11 MR. MITCHELL: I understand it, Your  
12 Honor. I guess in response to that I would say that  
13 determination of the amount of sanctions then would be  
14 premature at this time, because the depositions have  
15 not gone forward and Mr. Stein has not either had to  
16 re-review the materials or re-prepare. So it would be  
17 premature.

18 In addition and along those same lines,  
19 when it became apparently late yesterday afternoon,  
20 number one, that even if the Plaintiff was prepared to  
21 present Ms. Tong for her deposition, I was unable to  
22 contact her and, once again, contacted Mr. Stein's  
23 office to inform him in an attempt to save their  
24 office from additional costs of appearing here first  
25 thing this morning. I did tell them that I would be

Page 13

1 here first thing this morning in case the Court was  
2 able to hear this matter early, as I appreciate that  
3 you are.

4                   What this really boils down to, Your  
5 Honor, is that the Plaintiff is between a rock and a  
6 hard place right now. We certainly do not want to  
7 fail to comply with this Court's order and it is  
8 certainly not done in any sort of disrespect to Your  
9 Honor or the authority of this Court. And it is not  
10 done in bad faith.

11                  The problem is a balancing of the  
12 Plaintiffs foregoing their right to arbitration under  
13 the Federal Arbitration Act and the Defendants having  
14 to delay taking the Plaintiff's deposition until after  
15 the District Court decides whether or not this matter  
16 is appropriate to go to arbitration and that all  
17 proceedings in this matter be stayed.

18                  I have never stood before a Court and  
19 explained that I have a duty to my client that  
20 requires me not to comply with a Court order and I am  
21 uncomfortable doing so. I'm uncomfortable doing so,  
22 Your Honor. But I feel that if I produce my client, I  
23 will waive her right to arbitrate. And I imagine  
24 Mr. Stein, being a very talented lawyer, that would be  
25 one of his first arguments that that right had been

Page 14

1 waived.

2 THE COURT: That may well be his  
3 argument. Whatever. It has been a while since I  
4 practiced law, but I never, I never felt any  
5 professional or ethical duty to disobey a Court order  
6 or to advise a client not to follow a Court order.

7 And other than attacking an order as  
8 being illegal or improper or something like that, I  
9 can't conceive that a lawyer would ever think that  
10 that would be the professional or ethical thing to  
11 do. It might be the choice a lawyer would make, but I  
12 wouldn't think it would be in keeping with  
13 professional standards and I've never heard that.  
14 I've never heard a lawyer say that he felt that  
15 obligation, especially under these circumstances.

16 I've been a judge of various kinds for  
17 more than 26 years and I've never heard of it and I've  
18 heard a lot, especially under these circumstances when  
19 it seems to be a standard operating procedure that  
20 it's late the day before or the night before you get  
21 notice to the lawyer, "I can't do it," and by "do it,"  
22 I mean, I can't follow the Court's order.

23 I don't know what you think your duty to  
24 your client may be, but you are in real close danger  
25 of losing your client and your case, because it is

1 sometimes appropriate for a sanction to include a  
2 dismissal of the case. And you and your client are  
3 both very close to that and it is certainly not out of  
4 the question.

5 I'm in unchartered ground, because I've  
6 never had a lawyer not appear and not produce his  
7 client twice when overdue. And I know you are busy,  
8 lawyers have a lot of things to do, but I don't hear  
9 too many lawyers saying, "Well, I had something else  
10 to do, so it wasn't convenient to me, so my client and  
11 I couldn't appear for the court-ordered hearing."  
12 That's a little shocking to me, because that's not  
13 anything I've ever learned, practiced or thought to be  
14 proper and appropriate conduct.

15 And I don't believe they do that in the  
16 circuit courts where you practice or in the federal  
17 courts where you practice. And if that's a standard  
18 practice, and we've got two instances of it right here  
19 within a very short period of time, I find it a little  
20 bit shocking.

21 MR. MITCHELL: Your Honor, may I  
22 respond?

23 THE COURT: You may.

24 MR. MITCHELL: First, Your Honor, that  
25 with respect to appearing at the hearing, I am, I have

Page 16

1 appeared for the Court's hearing and was prepared to  
2 be here at 3 o'clock this afternoon, the time the  
3 Court directed counsel to be here for the hearing for  
4 Motion to Compel.

5 With respect to my client, as I informed  
6 the Court, I was not able to speak with her after  
7 receiving this Court's order until very late yesterday  
8 afternoon. She arrived from out of country and was at  
9 the airport and not even past the customs yet and  
10 received my voice mail, I should say my co-counsel's  
11 voicemail, and returned his call.

12 So if the Court -- if it is something  
13 that I said that led the Court to believe I was too  
14 busy to comply with this Court's order, then I  
15 apologize for misspeaking, that is certainly not the  
16 case, Your Honor. I was here at 9 o'clock this  
17 morning and I certainly was prepared to proceed at 3  
18 o'clock this afternoon.

19 With respect to failing to appear on two  
20 occasions close to each other, one of those occasions  
21 involved this Court's order, the other involved a  
22 Notice of Deposition in which I spoke with Counsel.

23 THE COURT: You are correct.

24 MR. MITCHELL: Your Honor, I understand  
25 that in your experience, and you certainly have quite

1 a bit more experience than I do in the practice of  
2 law, there are occasions, and I don't know if it is an  
3 analogy to the one that is before the Court currently,  
4 when a Court will direct a litigant to produce  
5 information that that attorney believes is either  
6 privileged or protected or will somehow impair his  
7 client's rights, and the ethical obligations to that  
8 client require attorneys on occasions not to comply  
9 with the Court's order.

10                   And again, I have not ever had to do  
11 this before and I do not value doing it now and I  
12 certainly mean no disrespect to this Court.

13                   THE COURT: I agree with you there are  
14 occasions and pending an attorney's application for  
15 writ of mandamus is certainly an occasion. In this  
16 particular situation, pending some appeal to the  
17 District Judge who referred this matter to me, might  
18 be such an occasion.

19                   But absent something like that in which  
20 the lawyer is seeking judicial protection from a  
21 judicial directive, I don't know what school teaches  
22 that it is all right for a lawyer not to follow the  
23 Court's order.

24                   And I would be a little more sympathetic  
25 with your explanation if you didn't tell me

Page 17

Page 18

1 essentially as a lawyer you can't let your client  
2 appear for fear she might waive some legal right  
3 that's on the verge of being totally lost anyway. And  
4 we're here on a Motion to Compel and for sanctions,  
5 really, insofar as your client is concerned, but you  
6 are real close to, if you haven't already, admitted or  
7 confessed to sanctionable conduct. And it is just a  
8 little shocking to me. I don't see a lot of that.

9                   Frankly, we don't have a lot of  
10 discovery problems here, but to think because you are  
11 in some trial of a case that you can call a lawyer or  
12 because your client's out of pocket, you can just more  
13 or less ignore the Notice of Deposition or the order  
14 to appear, anyway, I guess you've got me shocked, I  
15 will admit that.

16                   And at the conclusion of this I'm not  
17 going to enter any order. I am going to request  
18 affidavits of costs and attorneys' fees in connection  
19 with this hearing and the lack of attendance at the  
20 earlier deposition. And in all likelihood, I expect  
21 to enter an order that compels the attendance of your  
22 client for a deposition.

23                   And I will, I guess, I'll give you a  
24 chance to reexamine your views and to consider what's  
25 ethical and professional and whether it is worth your

Page 19

1 being sanctioned as an attorney. I don't know  
2 anything about you. I don't know if -- I know some  
3 attorneys who it is just like water off a duck's back,  
4 but whenever you are asked by any Court "Have you been  
5 sanctioned?" If you tell the truth, you would have to  
6 say, "Yes, and here's what I did, I didn't want to  
7 follow the Court's order, so I chose a higher path" or  
8 however you would want to explain it.

9                   But in any event, this is what I expect  
10 to do and should you not appear, as you are appearing  
11 now, or should you direct your client not to appear,  
12 your conduct may be sanctionable.

13                   Should your client not appear, she  
14 certainly will be in jeopardy of losing her case  
15 without ever getting to Court because she wouldn't  
16 give a deposition.

17                   In any event, that's about where I am  
18 with you, Mr. Mitchell, and I regret it, but I don't  
19 look over my shoulder a lot, because I don't do what's  
20 right first, I try to follow the law, then I try to  
21 follow the rules, and within that narrow perimeter,  
22 then I do what is right. But I never first do the  
23 right thing and then look to see is this within the  
24 law or the rules. And I think that's where you are.  
25 So we may be a little different.

Page 20

1                   But in any event, Mr. Stein, do you wish  
2 to be heard?

3                   MR. STEIN: I do, Your Honor. And I  
4 will have to ask to be excused for being a sceptic or  
5 being rude, but I don't think this is a good case of  
6 good faith and I'll share with the Court why.

7                   I'd like to offer first as an exhibit a  
8 letter dated July 28, 2004.

9                   (Hearing Exhibit No. 2 marked for  
10 identification and admitted.)

11                  MR. STEIN: May I approach, Your Honor?

12                  THE COURT: You may.

13                  MR. STEIN: By this letter, we sent a  
14 letter by facsimile transmission to both of the  
15 Plaintiffs' lawyers of record in Illinois, and I'll  
16 also add that Plaintiff also has local counsel here in  
17 Fort Worth, three different lawyers available to  
18 Plaintiff, requesting the deposition of Josephine Tong  
19 and her expert, Frank Birgfeld.

20                  And the Court should also be aware that  
21 this case is old. This is a two-year-old case. It  
22 was initially filed in Chicago. It was transferred  
23 down here to Texas.

24                  We got no response to this letter.  
25 Ever. So in August, and these notices are attached to

Page 20

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2 to be heard?

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22 was initially filed in Chicago. It was transferred  
23 down here to Texas.

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25 Ever. So in August, and these notices are attached to

Page 21

1 the Motion to Compel, we noticed the depositions of  
2 the Plaintiff and the expert.

3 We stated in the Motion to Compel,  
4 Section A, that Plaintiff and her expert probably  
5 never had any intention of appearing at these  
6 depositions. The Court should require that the  
7 Plaintiff offer proof of travel arrangements as  
8 evidence on this point.

9 Plaintiff never filed a response to this  
10 motion. Plaintiff has never made a showing that she  
11 or Frank Birgfeld ever intended to appear for these  
12 October depositions as noticed for months; no proof of  
13 airline tickets, hotel reservations, anything else,  
14 only this one call from one of the lawyers late in the  
15 afternoon the day before when at least two other  
16 counsel could have been available to present a witness  
17 for deposition. If lead counsel wanted to prepare the  
18 witnesses, he could have done that well in advance of  
19 the depositions. But any of the other two lawyers  
20 could have presented those two witnesses for  
21 deposition.

22 There is simply no valid excuse  
23 whatsoever for the Plaintiff and her expert not  
24 appearing for the first deposition scheduled. There's  
25 no showing that they ever intended to appear for those

Page 22

1 depositions.

2                   Nonetheless, the Court essentially gave  
3 the Plaintiff and her expect a second chance by  
4 ordering in response the Motion to Compel that the  
5 Plaintiff and her counsel appear for depositions today  
6 and tomorrow. And as counsel has explained, he  
7 intentionally disregarded that order for strategical  
8 purposes.

9                   There's no reason for a third chance.  
10 I'm not that unique or unusual lawyer that can prepare  
11 for deposition or trial or hearing and a month later,  
12 without anything else, show up and do my work. I did  
13 spend additional time reviewing, re-reviewing the  
14 work, meeting again with the client to prepare for the  
15 depositions for today and tomorrow. And I understand  
16 the Court wants that evidence by affidavit, and we're  
17 certainly willing to do so.

18                   We're here today. We can handle this  
19 however the Court wants to, but we certainly believe  
20 that a dismissal of the Plaintiff's case is  
21 appropriate given the history and lack of evidence and  
22 good faith on the part of the Plaintiff or her expert  
23 witness to prosecute this case that is two years old.

24                   We have a discovery deadline of  
25 December 30. The time has past for the discovery to

1 have been produced and for this case to be prosecuted  
2 if the Plaintiff really has a sincere interest in  
3 doing so. She did file discovery. She sent  
4 interrogatories to Defendants in this lawsuit. She  
5 filed the lawsuit.

6                   We filed in our response through motion  
7 of arbitration case law that shows when a plaintiff  
8 files litigation, she's waived any right to  
9 arbitration, if she ever had it. This motion to  
10 compel arbitration is based on two documents that not  
11 only are not in the names of the Defendants, they are  
12 not signed by anybody.

13                  So in sum, the Court has every ground  
14 and reason and basis to disregard whatever excuses  
15 have been offered this morning by the Plaintiff, to  
16 enter the sanctions for the prior conduct and to enter  
17 a dismissal of Plaintiff's claims based on everything  
18 that has happened up to this moment.

19                  THE COURT: Thank you, Mr. Stein.

20                  Did you wish to be heard, Mr. Mitchell?

21                  MR. MITCHELL: Just very briefly, Your  
22 Honor. The characterization that the Plaintiff is  
23 intentionally failing to comply with this Court's  
24 order for some strategical purpose is simply not  
25 correct. And I'll just stand on what I explained to

Page 24

1 the Court. I explained it fairly lengthy. I  
2 understand how the Court received that, but that was  
3 my explanation.

4                   With respect to dismissal of this case  
5 for failure to comply with one court order, the case  
6 law in the Fifth Circuit is fairly extensive with  
7 respect to the sanction of a dismissal of a  
8 Plaintiff's case. And from my review of that case law  
9 it appears as if that being the harshest sanction this  
10 Court can impose, that the Court is required to at  
11 least attempt lesser sanctions before dismissing a  
12 plaintiff's case for failure to comply with the second  
13 court order.

14                   That's all I have, Your Honor. Thank  
15 you.

16                   THE COURT: Does Counsel for either side  
17 have any particular special plans during the next 10  
18 days to two weeks?

19                   MR. STEIN: Let me address that, Your  
20 Honor, first. The answer is "yes" for me. For  
21 whatever reason, the perfect storm has occurred in my  
22 professional life in the sense that I have multiple  
23 cases all demanding time at the same time.

24                   In fact today I was scheduled to be in  
25 Houston for the second day of depositions that were

Page 25

1 ordered by an arbitration panel to occur today. I got  
2 another lawyer from our office to handle that. I have  
3 another case, multiparty case, with depositions today  
4 that I was supposed to be at and I got another lawyer  
5 to handle. I'm scheduled to be in Austin on the 3rd  
6 for an arbitration, December 3rd. I'm on a trial  
7 docket in Hidalgo County for December 6 for a  
8 three-week case in which there are about 15 parties.

9                   I didn't bring my calendar with me, but  
10 I can tell the Court I've got about five cases with  
11 multiparties where we have all gotten our calendars  
12 out and scheduled depositions and virtually every day  
13 from now until April -- I'm set for an arbitration in  
14 Houston that's supposed to last for three weeks  
15 starting January 28th. I'm actually going to take two  
16 days and take my children skiing in the middle of  
17 January, the 13th to 17th, including those two weekend  
18 days.

19                   I will do whatever is necessary to  
20 comply with the Court's directions to handle this  
21 case, but it is a huge inconvenience for us not to  
22 have gone forward with the depositions today and  
23 tomorrow.

24                   THE COURT: I understand. Thank you,  
25 Mr. Stein.

Page 26

1                   Mr. Mitchell?

2                   MR. MITCHELL: Your Honor, I will also,  
3 I will make myself available. I will speak with my  
4 client and explain Your Honor's position and the  
5 admonition to her accordingly.

6                   THE COURT: I'm going to order -- I'm  
7 going to give you a chance to see what is in your best  
8 professional interest and what is in the best interest  
9 of your client. I'm going to order another appearance  
10 and I'm going to do it soon and I may even do it on a  
11 Saturday when I know there are no -- well, not too  
12 many court appearances.

13                  So if this is something that you just  
14 can't do because of some personal moral compass within  
15 your makeup, then that's fine. And I'm going to order  
16 that she appear for that deposition upon pain of  
17 dismissal.

18                  In the meantime I'm going to order --  
19 and, Mr. Stein, I see that there are other attorneys  
20 in your firm. I am going to order that by  
21 December 8th you furnish the Court whatever evidence  
22 in support of monetary sanctions and attorneys' fees  
23 as a result of both the October 6th nonappearance and  
24 the nonappearance today.

25                  I'm not going to order the appearance of

Page 27

1 the expert, but I am going to consider whether an  
2 appropriate sanction, and I think it certainly could  
3 be, for his nonappearance would be that there be no  
4 evidence from him. And if you want to, Mr. Stein, you  
5 could address that. That's certainly where I'm  
6 leaning.

7                   And I might be inclined to do the same  
8 thing with Ms. Tong, except I think she may have been  
9 misled. And I think by the time of the next -- I  
10 don't know that another hearing will be necessary,  
11 since we've got busy schedules, I may accept a report  
12 of what happened.

13                  In any event, I'm asking for your input,  
14 Mr. Stein, within eight days and fax that to  
15 Mr. Mitchell.

16                  And, Mr. Mitchell, I'm asking that you  
17 get that back within two days, because you won't  
18 have -- there's not a lot to respond to when a lawyer  
19 says "This is what I've done, this is my standard  
20 rate," so I'm going to ask that you reply within two  
21 days. I will reduce this to writing today.

22                  And I'm very flexible, since I'm not  
23 going to be at the next deposition, it can be here on  
24 the 9th or 10th of December or it can be anywhere. It  
25 can be in Mr. Stein's office on the 11th, which is a

Page 28

1 Saturday morning.

2 MR. STEIN: Frankly, Your Honor, that  
3 would be our preference. Obviously the defense have  
4 been greatly inconvenienced and expensed by dealing  
5 with this matter and if we can do it in my office, it  
6 shouldn't make any difference to the Plaintiff coming  
7 from Chicago. It would be preferable for the  
8 Defendants.

9 THE COURT: Very well. How is 9 o'clock  
10 on December the 11th?

11 MR. STEIN: It is fine for me, Your  
12 Honor.

13 THE COURT: I will order that that  
14 deposition be held, that Ms. Tong appear at 9 o'clock  
15 for that deposition.

16 MR. MITCHELL: Your Honor, may I ask  
17 that that be ordered just a little bit later in the  
18 day, just a little later in the morning so that we can  
19 actually fly in that morning and do not have to spend  
20 Friday night over?

21 THE COURT: I'll change that to 10:00.  
22 I think there are a number of airlines, even Southwest  
23 flies pretty frequently. I don't know how long the  
24 deposition might take.

25 But in any event, I also will direct

Page 29

1 that the lawyers report to the Court what happened at  
2 that deposition. I'll give you until Tuesday. And  
3 whatever your reports are will be a part of the record  
4 of this hearing, and that would be Tuesday, I guess,  
5 the 14th of December.

6 THE COURT: Mr. Stein, did you --

7 MR. STEIN: Well, I got a note from  
8 Mr. Gulis, who is one of the people most involved with  
9 this case from the Defendant's standpoint. He has  
10 written me a note he's out of town on the 11th.  
11 Obviously, he'd like to be at the deposition.

12 Is there any chance we could do it this  
13 Saturday?

14 MR. GULIS: I'm out of town this  
15 Saturday, too. If I have got to come back in I prefer  
16 to have it at 9:00 in the morning so I can get back  
17 out of town to my family vacation. So if I have to  
18 come back Friday night and come to court, I'd like to  
19 get back to my family sometime on Saturday as early as  
20 possible. I mean, I prefer 8 o'clock.

21 THE COURT: Well, I can go back to 9:00,  
22 because I think that's reasonable. And there are  
23 flights, it is easier to fly into Love, Love Field in  
24 Dallas, especially if you are going to be in Dallas.

25 So I'm not trying to inconvenience

Page 30

1 anyone. I just like to eat what's on my plate every  
2 day and not leave anything left over. This is  
3 unfinished business, but I intend to get it finished  
4 as soon as I possibly can. But I do think because of  
5 the importance of the question of appearance or  
6 nonappearance and counsel's choice, that it is  
7 extremely important --

8 MR. STEIN: Thank you, Your Honor.

9 THE COURT: -- to whatever ruling I may  
10 make and to whatever sanctions I may take, or any.

11 MR. MITCHELL: I understand, Your  
12 Honor. If I may say just one more thing for the  
13 record.

14 My decision would be that decision that  
15 was made for today or in the future and is not based  
16 on an internal moral compass, but what my  
17 understanding of the rules of professional conduct are  
18 with respect to my duties to my client.

19 THE COURT: As I already said, I'm  
20 shocked. I think you need to check those rules  
21 again. And whatever you may ever owe to your client,  
22 your duty to the courts and other lawyers never are  
23 required to be put on the back burner because of some  
24 perceived notion.

25 I think probably you and I may never

Page 31

1 agree on the matters of professionalisms, ethics and  
2 civility and I think you're way outside of the  
3 mainstream of thought.

4                   But in any event, I will enter this  
5 order. I'm sorry for the inconvenience about setting  
6 the deposition. I know this is not fun for you, but I  
7 do promise shortly after I receive your input about  
8 this hearing I will enter an order and then my role in  
9 this may be concluded, although it is possible that  
10 Judge Means would send me something else, if there  
11 were anything else. And I really don't believe there  
12 is going to be a whole lot more of pretrial discovery  
13 or maybe even not much of a life left in the case,  
14 mostly, Mr. Mitchell, because of you.

15                   In any event, are there any other  
16 matters to be considered in connection with this  
17 hearing?

18                   MR. STEIN: Not from our standpoint,  
19 Your Honor.

20                   MR. MITCHELL: No, Your Honor.

21                   THE COURT: Very well. Thank you. That  
22 concludes this hearing. We are adjourned.

23                   (Adjourned at 10:23 a.m.)

24                   -- 0 --  
25

Page 32

1 THE STATE OF TEXAS

2 COUNTY OF TARRANT

3 I, SARAH MAE BLACKBURN, Deputy Official Court  
4 Reporter in and for the United States District Court  
5 for the Northern District of Texas, Fort Worth  
6 Division, do hereby certify that the above and  
7 foregoing contains a true and correct transcription of  
8 all portions of evidence and other proceedings  
9 requested in writing by counsel for the parties to be  
10 included in this volume of the Reporter's Record, in  
11 the above-styled and numbered cause, all of which  
12 occurred in open court or in chambers and were  
13 reported by me.

14 I further certify that this Reporter's Record of  
15 the proceedings truly and correctly reflects the  
16 exhibits, if any, admitted by the respective parties.

17 I further certify that the total cost for the  
18 preparation of this Reporter's Record is \$ 418.55  
19 and was paid by Defendants.

20 WITNESS MY OFFICIAL HAND this the 8 day of  
21 December, 2004.

22   
23 SARAH MAE BLACKBURN, Texas CSR #1332  
24 Expiration Date: 12-31-05 Firm Registration No. 95  
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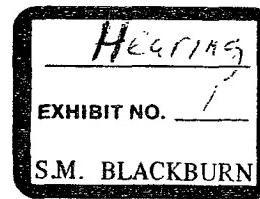
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## FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Kenneth Stein	Jeffrey T. Mitchell jeff@konicekdillonlaw.com
COMPANY:	DATE:
Matthews, Stein, et al	November 29, 2004
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RE: Tong v. Direct Trading

Dear Mr. Stein:

We have attempted to contact our client since receipt on November 22, 2004 of the court's order compelling her deposition for November 30, 2004. We have not been able to do so. Accordingly, we are unable to produce her for deposition tomorrow. I will be present at the courthouse tomorrow morning at 9:00 a.m. and will also attend the hearing with the Magistrate at 3:00 p.m. However, kindly cancel any court reporter that may have been ordered as the deposition cannot proceed without the deponent. This letter is sent in an attempt to prevent your firm from incurring fees and costs of Ms. Tong's deposition.

In addition, we intend to discuss the issues raised in our motion to vacate with the Magistrate during this 3:00 p.m. hearing with respect to the pending motion to compel arbitration and stay proceedings.

If you wish to discuss this matter prior to tomorrow, I will be available at 4:00 p.m. CST.

Very truly yours,

KONICEK & DILLON, P.C.

  
Jeffrey T. Mitchell  
JTM/jtl  
cc: John Burke

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July 28, 2004

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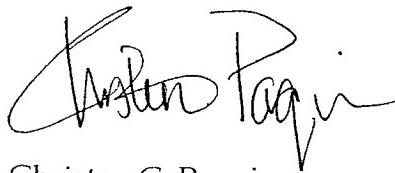
Re: Cause No. 4:03-CV-1234-Y  
Josephine Tong  
vs.  
Direct Trading Corp., et al.  
Our File No.: 2875-59142

Dear Counsel:

Direct Trading Corporation would like to depose Josephine Tong and Plaintiff's expert, Frank J. Birgfeld in the above referenced matter. By Wednesday, August 4, 2004, please provide me with dates that Ms. Tong and Mr. Birgfeld will be available in August and September 2004.

Thank you for your cooperation in scheduling these depositions.

Sincerely,



Christen C. Paquin

CCP/lmj

S:\223\2\2875\59142\Correspondence\counsel burke 001 wpd 223

